BEFORE THE JOINT
SHORELINES HEARINGS BOARD
AND
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF MR. AND MRS. E. S. CARLSON, et al., Appellants,	)	SHB No. 223
v.	)	PCHB Nos. 1029 & 1029-B
VALLEY READY MIX CONCRETE CO., YAKIMA COUNTY, YAKIMA COUNTY CLEAN AIR AUTHORITY, DEPARTMENT OF NATURAL RESOURCES, DEPARTMENT OF ECOLOGY, DEPARTMENTS OF FISHERIES AND GAME, Respondents.	)	ECPA No. 4

I. HEARING

Oral argument in SHB No. 223 and PCHB No. 1029 (ECPA No. 4), appeals from final decisions rendered pursuant to an Environmental Coordination Procedures Act (ECPA) master application, was heard in Lacey, Washington on December 8, 1976. Oral argument in PCHB No. 1029-B (ECPA 4) was heard on April 7, 1977. Pursuant to RCW 90.62.080(1), Yakima

County's final decision approving a substantial development permit with conditional use for the project was reviewed by the Shorelines Hearings Board: Art Brown, Chris Smith, W. A. Gissberg, Robert E. Beaty, Robert F. Hintz and Ralph A. Beswick. The ECPA final decisions rendered by the Yakima County Clean Air Authority and the Washington State Departments of Natural Resources, Ecology, Fisheries and Game were reviewed by the Pollution Control Hearings Board: Art Brown, Chris Smith, and W. A. Gissberg. Hearing examiner Ellen D. Peterson presided.

Appellants Mr. and Mrs. E. S. Carlson, et al., were represented by John A. Rossmeissl; Alan D. McDonald and Bryan G. Evenson represented respondent Valley Ready Mix; Deputy Prosecuting Attorneys Gary M. Cuillier and Anthony F. Menke appeared for respondent Yakima County; Assistant Attorney General Robert V. Jensen appeared for respondent Department of Ecology; Assistant Attorney General Scott Wyatt appeared for respondent Department of Natural Resources; Robert Crossland, Director, represented Yakima County Clean Air Authority.

The review by both Boards in these matters was as provided in

RCW 34.04.130,[1] incorporated by reference in RCW 90.62.080(1). That is, the scope of the Boards' review was not de novo but was limited to review of the record below[2], oral argument, and consideration of written briefs. (ECPA 4 is the first and will be the only matter heard by the joint Boards solely under the strict review limitations placed upon them by RCW 90.62.080(1))[3].

II. BACKGROUND

The basic purposes of the Environmental Coordination Procedures Act, as expressed in the legislative findings[4], were to:

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1. . . .

(5) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the agency; or

(c) made upon unlawful procedure; or

(d) affected by other error of law; or

(e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or

(f) arbitrary or capricious.

2. The "record below" was specifically identified in V of the Pre-Hearing Order dated August 6, 1976 and supplemented by Order dated October 12, 1976.

3. Laws of 1971, 1st Ex. Sess. ch. 54, § 6, amended RCW 90.62.080 to give the Board de novo review with decisions based upon a "preponderance of the evidence".

4. RCW 90.62.010

1. Provide an optional coordinated procedure for an applicant whose project required two or more permits.

2. Provide the public an "easier opportunity to present their views comprehensively" on proposed uses of natural resources and environmental concerns.

3. Provide developers a "greater degree of certainty" with regard to permit requirements, and

4. Improve information and coordination in land use decisions among state and local agencies.

Valley Ready Mix Concrete Company filed an ECPA master application with Yakima County on May 16, 1974 seeking necessary approval and permits for the operation of a gravel crushing and mining operation on the lower reaches of the Yakima River. As required by RCW 90.62, the Yakima County Director of Planning certified on August 28, 1974 that the application met all zoning requirements and it was filed as an ECPA master application by the Department of Ecology on August 30, 1974. "Final decisions" responsive to this master application were transmitted by the Department of Ecology on April 27, 1976 from which appeals were filed by appellants with the Shorelines Hearings Board and the Pollution Control Hearings Board on May 25, 1976 (SHB No. 223 and PCHB No. 1029) and May 27, 1976 (PCHB No. 1029-A).

ORDERS

The Findings, Conclusions of Law and Order infra relative to the issuance of the substantial development permit is the decision of the Shorelines Hearings Board. The Findings, Conclusions of Law and Orders infra affirming the final decisions of the Department of Ecology

Departments of Fisheries and Game, Department of Natural Resources and the Yakima County Clean Air Authority are the actions of the members of the Pollution Control Hearings Board.

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF MR. & MRS. E. S. CARLSON, et al., Appellants, v. VALLEY READY MIX CONCRETE CO., and YAKIMA COUNTY, Respondents.	SHB No. 223 ECPA No. 4 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT

I.

Under its ECPA application, the Valley Ready Mix Concrete Company proposes to mine aggregate and process it into sand, gravel and crushed rock[5]. This operation is intended to replace an existing nearly depleted gravel operation located three miles downstream from the proposed site.

5. The asphalt plant originally proposed was deleted from the project and not authorized under the substantial development permit.

The new site, an area of 150 acres, is adjacent to the Yakima River in Sections 26 and 27, Township 10 north, R. 21 EWM.

The site is located in a rural, relatively undeveloped area of Yakima County. A broad (approximately 650' to 1900') level floodway separates the plant location from the Yakima River. The site backs against a bluff approximately 150' high; Emerald Road, providing access to the site, follows the crest of this bluff. North of the road at a higher elevation lie scattered homesites, the nearest of which is approximately 700' from the plant site. (The specific location of the plant site and stockpile is detailed in Appendix 4, Index II of the Record

III.

Approximately 100 acres of the site is to be mined. A three cubic yard crescent bucket will be attached to a high line and secured to a 90 foot high mast at the plant site. The bucket descends the cable, scoops the surface to be excavated, and discharges the collected gravel onto a conveyor belt which transports the gravel to the plant for processing and stockpiling. The mining is to be completed in four phases with each phase involving the excavation of approximately 25 acres.

All buffer strips between the Yakima River and the excavation will be a minimum of 100 feet wide with no project work of any kind occurring thereon.

IV.

The plant itself will consist of a gravel screen, a sand classifier, a crusher for oversize rock, and the processed gravel stockpiles. Rock received at the plant will be washed, screened and various sizes stockp

Stockpiled and freshly processed materials will be trucked to concrete plants in Sunnyside and Grandview or delivered to customers in the lower Yakima Valley.

The substantial development permit limits operation of the plant to two shifts per day between the hours of 5:00 AM and 9:00 PM.

V.

Reclamation of the area will be a continuing process. With the maximum depth of excavation planned at 30 feet below the surface, depletion of the deposit is estimated at a minimum of 17 years and a maximum of 34 years. Upon completion of the mining, the restored site is to be donated to the public as a park and will include an all weather access road and a lowland lake.

VI.

In response to the ECPA master application filed in this matter, the Yakima County Board of County Commissioners on April 15, 1976 issued a substantial development permit to Valley Ready Mix for the project as proposed, subject to the following conditions:

1. Operation of the gravel plant and its associated equipment shall be limited to two shifts daily and under no circumstances will there be any operation during the hours of 9:00 o'clock p.m. to 5:00 o'clock a.m. of any day;

2. The principle [sic] access road to the site, which is all on the Valley Ready Mix Company property, shall be the subject of dust abatement procedures initiated and maintained by Valley Ready Mix Company on a regular basis to eliminate the generation of dust as much as is possible;

3. Noise levels at the Valley Ready Mix Company property line must meet state requirements, and the Board of Yakima County Commissioners reserves unto itself the right to review noise levels produced by the gravel plant during

the first six (6) months of full-scale operation. If the noise level from the site creates a nuisance, the Board may require the gravel plant operator to meet noise level standards supplemental to and possibly more stringent than those contained in Chapter 173-60 of the Washington Administrative Code or other pertinent codes and regulations;

4. No mining operations shall alter, impede or retard the flow or direction of flow of the Yakima River;

5. All stock piles and material placed in wetland areas shall be situated with their long axis parallel to the direction of flood water flow;

6. Mining operations shall be conducted in a manner which will not allow water to collect and permit stagnant water to remain in excavations. All such excavations shall be back-filled and graded by Valley Ready Mix Company with material approved by the Shoreline Administrator;

7. Where mining and quarry operations reach a depth where water flow is adequate to prevent stagnation, bodies of water may be left, provided that:

   a. They be compatible with uses in the area;

   b. All banks and soil, sand, gravel and other unconsolidated material shall be sloped by Valley Ready Mix Company to five feet below the low ground water line at a slope no steeper than three feet horizontal to one foot vertical. All soil and rock banks shall be terraced or other measures taken by Valley Ready Mix Company to permit a person to escape from the water;

   c. Above-water reclaimed area shall be covered by Valley Ready Mix Company with four inches (4") of the removed over burden able to support indigenous vegetative ground cover and shall be replanted with vegetation to blend with the surrounding environment.

8. Reclamation of mine areas shall be complete within two years after the operation is finished, or within two years after a cessation of surface mining, which is not set forth in the operator's mining plan or in any other sufficient written notice extending for more than six consecutive months;

9. This permit is subject to the following time requirements:

a. Construction or substantial progress toward construction of the development for which this permit has been granted pursuant to the Shoreline Management Act must be undertaken within two years after approval of the permit by Yakima County or the permit shall terminate. If such progress has not been made, a new permit will be necessary;

b. If the development for which this permit has been granted pursuant to the Shoreline Management Act has not been completed within five years after approval of the permit by Yakima County, the County shall, at the expiration of the five-year period review the permit and upon a showing of good cause do either of the following:

i. Extend the permit for one year; or

ii. Terminate the permit.

10. This permit is granted pursuant to the Shoreline Management Act of 1971 and nothing in this permit shall excuse the applicant from compliance with any other federal, state or local statutes, ordinances or regulations applicable to this project;

11. This permit may be rescinded pursuant to Section 14(7) of the Shoreline Management Act of 1971 in the event the permittee fails to comply with any condition of this permit.

VII.

Throughout the processing of the application, all parties mistakenly considered the project site to be in the "Conservancy" Environment under the master program. In fact, the site lies within the "Rural" designation. Both Environments provide for surface mining as a conditional use and the Board finds the error in identifying the designation to have been insignificant in terms of facts presented or judgments made thereon.

VIII.

Section 15.04.061 of the Yakima County Shoreline Master Program provides:

> No mining or quarry operations shall be permitted that will alter, cause to alter, impede or retard the flow or direction of flow of any stream or river.

In its Resolution approving the permit, the county commissioners found that

> 1. The project will not alter, cause to alter, impede or retard the flow or direction of flow of any stream or river;

The record supports the conclusion that any direct changes in the channel will be minimal and any anticipated alteration will be the result of natural phenomena.

IX.

The provisions of the Yakima County Master Program pertaining to criteria for issuance of a conditional use permit were relied on by the commissioners in their review of the application. Those criteria are as follows:

> 18.02 The applicant must supply whatever evidence, information, or agreements indicating that all of the following conditions will be met:
>
> 18.02.1 There is some necessity for a shoreline site for the proposed use, or that the particular site applied for is essential for this use, and that denial of the conditional use request would create a hardship on the applicant to locate the proposed use anywhere outside the shoreline jurisdiction area.
>
> 18.02.2 The design of the proposed use will make it compatible with the environment it will be placed in.
>
> 18.02.3 Water, air, noise, and other classes of pollution will not be more severe than the pollution that would result from the uses which are permitted in the particular environment.
>
> 18.02.4 None of the Goals, Policy Statements or specific aims of the particular environment would be violated, abrogated, or ignored.

18.02.5 No other applicable regulations will be violated.

18.02.6 The use will not interfere with public use of public shorelines.

The commissioners made the following findings and determinations:

1. There is some necessity for a shoreline site for the proposed use, the particular site applied for is essential for this use and denial of the Conditional Use request would create a hardship on the applicant to locate the proposed use anywhere outside the shoreline jurisdictional area;

2. The design of the proposed use will make it compatible with the environment in which it is placed;

3. Water, air, noise and other classes of pollution will not be more severe than the pollution that would result from the uses which are permitted in the particular environment involved;

4. None of the Goals, Policy Statements or specific aims of the particular environment involved would be violated, abrogated or ignored;

5. No other applicable regulations will be violated;

6. The use will not interfere with the public use of public shorelines. (Emphasis added).

X.

Noise levels were measured at the Valley Ready Mix existing site and at the proposed site with the following results:

TABLE I

NOISE LEVELS MEASURED AT EXISTING SITE

Measurement Location	Principal Noise Sources	Noise Levels dBA
#1 (50' from secondary screens)	All available equipment operating on site	75
#2 (100' from secondary screens)		69

#3 (200' from secondary screens)	64
#4 (50' from crusher)	79

TABLE II

NOISE LEVELS MEASURED AT PROPOSED SITE

Measurement Location	Principal Noise Sources	Noise Levels dBA
#5 (50'from Loader)	"Hough Model 100M" 3 1/2 yd. Diesel Front End Loader	81
#6 (Emerald Road approx. 700' from proposed site)		60
#7 (Residence on Nass Road approx. 800' from proposed site)		60
#8 (Residence on Nass Road approx. 1300' from proposed site)		52

XI.

The Department of Ecology regulations, WAC 173-60, promulgated for the control of noise and considered by the Yakima County Commissioners in their processing of the instant application, establish environmental designations for noise abatement (EDNA). The designations are based on "typical uses" within the zones:

> (a) Class A EDNA - essentially residential
> (b) Class B EDNA - commercial
> "(c) Class C EDNA . . .
> . . .
> (ii) Industrial property used for the production and fabrication of durable and nondurable man-made goods
> (iii) Agricultural and silvicultural property used for the production of crops, wood products, or livestock.
> . . . ." WAC 173-60-030.

WAC 173-60-040 MAXIMUM PERMISSIBLE ENVIRONMENTAL NOISE LEVELS

(1) No person shall cause or permit noise to intrude into the property of another person which noise exceeds the maximum permissible noise levels set forth below in this section.

(2) (a) The noise limitations established are as set forth in the following table after any applicable adjustments provided for herein are applied.

EDNA OF NOISE SOURCE	EDNA OF RECEIVING PROPERTY		
	Class A	Class B	Class C
CLASS A	55 dBA	57 dBA	60 dBA
CLASS B	57	60	65
CLASS C	60	65	70

(b) Between the hours of 10:00 p.m. and 7:00 a.m. the noise limitations of the foregoing table shall be reduced by 10 dBA for receiving property within Class A EDNAs.

(c) At any hour of the day or night the applicable noise limitations in (a) and (b) above may be exceeded for any receiving property by no more than:

(i) 5 dBA for a total of 15 minutes in any one-hour period; or

(ii) 10 dBA for a total of 5 minutes in any one-hour period; or

(iii) 15 dBA for a total of 1.5 minutes in any one-hour period.

Thus, e.g., an agricultural use existing on the subject site could create a noise level intensity on nearby residential properties of 60 dBA without violating WAC 173-60-040. Certain agricultural equipment during the period it is in operation, can be expected to reach this 60 dBA maximum.

XII.

In a Memorandum Opinion issued by the Presiding Officer on December 10, 1976, it was stated:

> . . .
> Permitted uses within the Conservancy Environment include agricultural, forest management, roads and railroads, and limited residential. Even if, sporadically, any one of these uses would achieve

> a level of intensity as great as that resulting from the gravel pit, 'more severe' must include not only the intensity of noise levels but also their duration. The gravel pit is authorized under the permit to operate daily from 5:00 a.m. to 9:00 p.m.

Motions to Reconsider this preliminary conclusion were filed by respondent Valley Ready Mix Concrete Co. on December 22, 1976 and by respondent Yakima County on January 11, 1977. Reconsideration was granted on January 14, 1977 and further oral argument on the limited issue of noise levels within the "Rural" designation was heard on April 7, 1977.

XIII.

A draft environmental impact statement for the proposed gravel pit was circulated on October 23, 1974. The final EIS was prepared and distributed in February, 1976.

XIV.

Any Conclusion of Law hereinafter stated which is deemed to be a Finding of Fact is hereby adopted as such.

From these Findings, the Board comes to these

CONCLUSIONS OF LAW

I.

For its standards of review, the Environmental Coordination Procedures Act incorporates by reference the provisions of RCW 34.04.130(6):

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or

(c) made upon unlawful procedure; or
(d) affected by other error of law; or
(e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or
(f) arbitrary or capricious.

The county's granting of the substantial development permit did not violate constitutional provisions, exceed statutory authority, or result from unlawful procedure. Nor does the record support a conclusion that the County acted arbitrarily or capriciously in approving the project.

To reverse the decision of the County therefore, the Shorelines Hearings Board must find that the County's decision was "clearly erroneous" in view of the record established and the legislative purposes of both the Shoreline Managment Act and the Environmental Coordination Procedures Act.

The clearly erroneous standard, as repeatedly stated by the Washington Courts,[6] requires that the reviewing court, herein the Shorelines Hearings Board, be left with the definite and firm conviction that a mistake has been made, despite there being evidence in the record to support the challenged administrative decision.

II.

In reaching its decision, the Board of Yakima County Commissioners was required to determine if the development proposed was consistent

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6. See, e.g., Ancheta v. Daly, 77 Wn.2d 255, 461 P.2d 531 (1969), Dept. of Ecology v. Ballard Elks, 84 Wn.2d 551, 527, P.2d 1121 (1974); Hayes v. Yount, 87 Wn.2d 280 (1976).

with: (1) the policies and other provisions of the Shoreline Management Act, (2) the guidelines and regulations of the Department of Ecology, and (3) the Yakima County's Master Program "as far as [could] be ascertained."[7] This Board is not firmly convinced that Yakima County erred in determining that the project, as conditioned, is consistent with these criteria.

III.

The record supports the county's concluding that the criteria for the granting of a conditional use permit were met in the instant case. In particular, upon further review and analysis of the noise level criteria, the Board concludes:

1. The Yakima County Commissioners' interpretation of "more severe" does not include a comparison of the potential cumulative effects of noise levels from permitted uses and the proposed gravel operation over an extended period of time. The time frame, e.g. one hour, is merely that necessary to measure the ambient noise level of a particular source.

2. Such a limited definition of "more severe" is not violative of the Shoreline Management Act or the DOE guidelines and regulations promulgated pursuant thereto.

3. Yakima County Commissioners' reliance on the DOE regulations regarding noise control for its definition of "more severe" was a reasonable exercise of its prerogatives as the legislative body interpreting and applying its own master program.

4. What this Board may consider the policy of a local

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7. RCW 90.58.140(2)

jurisdiction should be with regard to noise level restrictions cannot and should not act to vitiate an action of local government which, under the strict standard of review imposed under ECPA, was not clearly erroneous.

The condition of the substantial development permit as issued which obligates the county to monitor the operation for purposes of assuring noise control should be vigoriously enforced by the county. All techniques to mitigate and ameliorate the noise effects of the operation should be explored for efficacy and reasonableness, including: location of stockpiles, siting of plant in relation to bluff, direction of motors or exhaust away from homesites, possible utilization of mitigative equipment such as rubber screen cloths, avoidance of early morning or evening hours of operation, etc.

IV.

Appellants' challenge to the substantial development permit based on alleged violations of the Environmental Coordination Procedures Act, RCW 90.62, or the Department of Ecology regulations promulgated pursuant thereto, WAC 173-08, are without merit.

V.

The Shorelines Hearings Board has jurisdiction to review allegations of violations of the State Environmental Policy Act when such violations may invalidate a final decision rendered under the ECPA.

In reviewing such alleged violations, the Shorelines Hearings Board is subject to RCW 43.21C.090 which provides that with regard to SEPA compliance, "the decision of the governmental agency

shall be accorded substantial weight".

VI.

The environmental impact statement (EIS) prepared for the subject proposal was adequate in quantity and quality to meet the need of a decision maker to inform himself of the environmental impacts of the proposed action. The Board would further note that mitigative modifications to a project which are made responsive to environmental concerns expressed in an environmental impact statement are testimony to the efficacy of an EIS as a tool for enlightened decision making; such responsive modifications, made after issuance of a final EIS, do not necessitate the preparation of a second or supplemental environmental impact statement.

VII.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

Therefore, the Shorelines Hearings Board issues this

ORDER

The final decision of Yakima County Board of County Commissioners granting a substantial development permit to the Valley Ready Mix Concrete Company, with conditions, is affirmed.

DATED this 20th day of May, 1977.

SHORELINES HEARINGS BOARD

W. A. GISSBERG, Chairman

RALPH A. BESWICK, Member

ROBERT F. HINTZ, Member

CHRIS SMITH, Member

(See Dissent)

ROBERT E. BEATY, Member

BEATY, Robert E. (dissenting)--My decision in this matter was expressed by the memorandum opinion of December 10, 1976. While the Yakima County Commissioners may well have looked at the state noise regulations as a guideline to their decision-making, these regulations are in no way controlling, and do not save this permit which is obviously in violation of the Yakima County Shoreline Master Program. It is clearly erroneous for Yakima County to assert that a gravel crushing operation in full swing from the crack of dawn to late evening year round is not a "more severe" source of noise pollution than sporadic agricultural activities which may have peak noise levels equal to a gravel crushing operation. If the Master Plan had intended to say that conditional uses could exceed existing noise levels in rural zones it would have so stated. Instead it said such uses could not be "more severe," a different and stricter standard. The Commissioners erred to the extent that they concentrated on peak noise levels of agricultural activities in their deliberations.

The Master Plan attempted to assure that the character of rural areas would not be substantially altered by limiting noise levels. To interpret the Master Plan as the majority has done leads to absurd results. The gravel mining operation is plainly "more severely" noisy than orchardry. Conditional zoning, where permitted, is intended to make zoning sufficiently flexible to allow reasonable requests for uses not wholly out of conformity with the surrounding area though not strictly permitted. The conditions imposed ameliorate the effect of an otherwise incompatible use on surrounding property. However, to say that a gravel crushing operation is permitted 700 feet from single family residences

because certain minimal conditions are imposed defies logic and the reasonable expectations of homeowners in an agricultural area, let alone within the affected shoreline. This interpretation is consistent with the stated policies of the Act, which attempt to assure compatible uses adjacent to the shoreline zone. To allow conditional uses within the shoreline zone harmful to adjacent uses compatible with the permitted shoreline uses would effectively destroy the stated policy of the Act. If the zoning scheme in the Yakima County Shoreline Master Program is to have any validity at all, it must be interpreted to mean what it says. The noise generated by this facility is "more severe." Therefore, the Yakima County substantial development permit for the Valley Ready Mix Concrete Company should be rescinded.

ROBERT E. BEATY, Member

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF MR. AND MRS. E. S. CARLSON, et al., Appellants, v. YAKIMA COUNTY AND VALLEY READY MIX CONCRETE CO., et al. Respondents.	ECPA No. 4 SHB No. 223 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter is the reconsideration of a portion of the above-entitled matter in accordance with an order from the Thurston County Superior Court. Argument of counsel was heard by the Board, Nat W. Washington, Chairman, Chris Smith, David Akana, Rodney Kerslake and James S. Williams on October 1, 1979.

Appellants were represented by their attorney, John A. Rossmeissl; Valley Ready Mix was represented by its attorney, Bryan Evenson; Yakima

County was represented by Daniel Fessler, Deputy Prosecuting Attorney; Department of Ecology (DOE) was represented by Robert V. Jensen, Assistant Attorney General.

Having heard and considered the argument of counsel, and being fully advised, the Board makes the following

DECISION

I

This matter comes before the Board pursuant to the order of the Thurston County Superior Court which states in part as follows:

> . . .
> 3. That the decision of the Shorelines Hearings Board upholding the shorelines substantial development permit and conditional use permit pursuant to the Yakima County Shorelines Master Program and RCW 90.58 should be and hereby is affirmed in part and reversed in part and the matter remanded to the Shorelines Hearings Board for further consideration and review of the construction and application of the phrase 'more severe' as set forth in Section 18.02.3 of the Yakima County Master Program, as it relates to noise, pursuant to the standard of review set forth in RCW 34.04.130(6)(d) and the above entered Decision.

Section 18.02.3 of the Yakima County Snoreline Master Program (SMP) referred to by the court provides:

> Water, air, noise and other classes of pollution will not be more severe than the pollution that would result from the uses which are permitted in the particular environment.

The standard of review set forth in RCW 34.04.130(6) which is to be applied by the Board on appeals made under ECPA chapter 90.62 RCW[1]

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1. Chapter 90.62 RCW was amended by Laws 1977 chapter 54 section 6 which changed this Board's standard of review. However, this matter arose prior to such amendment and our review is in accordance with the original statute.

provides:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (d) affected by other error of law; or
> (e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; . . .

II

We previously upheld the Yakima County Commissioners' interpretation of "more severe" which compared only peak noise levels without regard to duration. We stated:

> What this Board may consider the policy of a local jurisdiction should be with regard to noise level restrictions cannot and should not act to vitiate an action of local government which, under the strict standard of review imposed under ECPA, was not clearly erroneous. (Emphasis added, Conclusion of Law III, entered May 20, 1977).

In accordance with the Court's decision, we must review the County's decision using the error of law standard in addition to the clearly erroneous standard referred to above. The issue involves noise. Reading Section 18.02.3 we conclude that the phrase "uses which are permitted" means those uses permitted outright in a given environment and not conditional uses. The County and Valley Ready Mix contend that the SMP provision requires that "more severe" noise be limited to peak noise levels. Appellant, now joined by DOE, contends that "more severe" noise must include peak and duration. Nowhere in the SMP is "more severe" or "noise" defined. The term "severe" is defined in Webster's Third

International Dictionary as "inflicting physical discomfort or hardship . . inflicting pain or distress . . . of a great degree or an undesirable or harmful extent." "Noise" is defined as "any sound that is undesired or that interferes with something to which one is listening . . . ." Thus, "noise" would seem to include any type of noise, peak noise, or noise over a period of time, so long as the noise is a sound which is undesired. If noise from a first source is more undesirable or harmful than noise from a second source, than the noise from the first source can be said to be "more severe" than the second source. From the ordinary meaning of the words, it must be concluded that appellant's contention comports with the ordinary meaning of the terms of the SMP more so than does respondents'. Nowhere in the SMP are we directed to find other meanings for the terms "more severe" or "noise." Although the County argues that the interpretation of noise which includes both peak and duration would prohibit surface mining operations as a conditional use within the shorelines, we are not similarly persuaded. We cannot assume that facilities or equipment are not available which would attenuate the sounds from surface mining operations on the record established. We must conclude that the County erred as a matter of law by interpreting the terms of its SMP as it did.

The original evidence in this matter dealt primarily with the peak intensity of sound from the existing gravel operation and selected agricultural equipment. There is insufficient evidence regarding noise,

including peak and duration, from the proposed gravel operation and from uses permitted outright. For that reason this matter should be remanded to Yakima County to take additional eveidence and to rule on the consistency of the proposed development with Section 18.02.3 as we now interpret it.

III

We note that in chosing the words of Section 18.02.3, Yakima County may have limited some instances where certain mining activity can be permitted in a rural environment. If this wording does not prove satisfactory, the solution lies in amendment of the Master Program. We are advised by the County's attorney in this matter that amendments to the Master Program are now under consideration.

ORDER

Our earlier order is vacated insofar as it suggests an interpretation contrary to this opinion. We remand this matter to the County for reevaluation of the permit application and to afford the applicant an opportunity to show that the operation proposed, or as further modified, can meet the SMP provision.

DATED this 6th day of December, 1979.

SHORELINES HEARINGS BOARD

CHRIS SMITH, Member

DAVID AKANA, Member

RODNEY KERSLAKE, Member

JAMES S. WILLIAMS, Member

NAT W. WASHINGTON, Chairman